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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. [redacted] 149

O. C. LEE, ET AL., - - - - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL., - - - - - Respondents.

REPLY BRIEF FOR PETITIONERS.

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No. 1120

O. C. LEE, ET AL., - - - - *Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL., - - - *Respondents.*

REPLY BRIEF FOR PETITIONERS.

May it please the Court:

The Louisville and Nashville Railroad Company, one of the respondents herein, has been a long time responsible employer. Both to its employees and to its customers it has become familiarly known as the "Old Reliable". Believing that this Company is still a responsible employer, petitioners have continued to work for this Company despite their being deprived of their time-earned seniority rights in jobs by a material *change* in a bargaining agreement under a pretext of an "agreed interpretation". So far they have been penalized by sticking by their employer.

FACTS OMITTED IN RESPONDENT L & N'S BRIEF.

The reputation for reliability has suffered a further challenge in the so-called counter-statement of the case in that Respondent's Brief. Petitioners have tried hard to present the facts as they occurred and exist. It has been most disappointing to petitioners, who have only been seeking what they believe to be their contract property rights, to have the Brief for their employer infer, or insinuate, that petitioners have misrepresented any facts. We fear that attitude of the Employer may have prevented the trial court and the Kentucky Court of Appeals from seriously considering the real issue.

That Brief on page 5 discusses the seniority rosters maintained by the Railroad Company for two adjoining shop yards. These were maintained for both districts for many years, with seniority therein carefully observed up to February 18, 1957. Petitioners were the employees listed on the mechanical rosters of the South Louisville Roundhouse.

Respondent, L. & N.'s Brief says on page 5: "The seniority of the employees at the South Louisville Roundhouse was purely geographical or what is known as point seniority."

This statement is entirely correct. But the rest of the sentence says "this seniority did not entitle them to follow the work from one seniority district to another". This latter part of that statement indicates that respondent considers that petitioners are asking in this case for an extension of rights to a geographical

area other than the one in which petitioners had worked for years and had their well earned seniority. A quick reference to Petitioners' Complaint would have enabled Respondent and its counsel to see the actual issue herein, and to avoid this misleading statement. Petitioners have at all times sought in this action only their seniority rights in the geographical area known as the "South Louisville Roundhouse". The Complaint in Equity states in part:

(T. of R. 30-31, Par. 25)—

"25. Despite the wording of the four bulletins in regard to force reduction, every position then being held by an employee on the South Louisville Roundhouse Roster was continued in operation. Immediately after the posting of the bulletins in regard to laying off the employees mentioned in four bulletins, the defendant Railroad Company advertised the specific jobs held by these employees on the bulletin board of the South Louisville Shops, without any such advertisement being posted on the board of the South Louisville Roundhouse. By February 13, 1957 all jobs desired by any employes listed on the Roster of the South Louisville Shops, which had previously been held by employes listed on the Roster of the South Louisville Roundhouse, were bid in and given to said employes of the South Louisville Shops, except a few jobs for which there were not employes at the South Louisville Shops available and desiring such assignments. * * *"

(T. of R. 31-32, Par. 26)—

"26. There was no discontinuance of any location of work by defendant Railroad Company

and no reduction in force made on February 18, 1957. The Action of the defendant Railroad Company in transferring the jobs in which the plaintiffs and the employees they represent was not authorized by Rule 26 of the skilled employees' agreement or Rule 13 of the unskilled employes' agreement, because there was in fact no reduction in force. Neither was the action of the defendant Railroad Company in giving these same jobs at the same locations to persons on another seniority Roster authorized by Rule 26 of the skilled employes' agreement or Rule 13 of the unskilled employes' agreement, because said employes were entitled, after being laid off, to priority in the restoration of forces laid off under the provisions of Rule 26(g) of the skilled employes' agreement and Rule 14(c) of the unskilled employes' agreement."

(T. of R. 33-34, Par. 30)—

"30. There was no abolition of any seniority point of the defendant Railroad Company or of any location or area being used by defendant Railroad Company in the servicing of its mechanical equipment as had been performed for more than fifty years at the location known as South Louisville Roundhouse. The action of the defendant Railroad Company was in fact only a discrimination against employes by allocating jobs at the South Louisville Roundhouse, not to those who had seniority in the performance of those same jobs at the same location, but to other employes who had lesser seniority and who had not theretofore been employed at all at the location used by the defendant Railroad Company as its South

Louisville Roundhouse. In fact the defendant Railroad Company merely took all work away that had theretofore been rendered by said employes and permitted them to work only by taking an entirely new seniority standing.

"In laying off plaintiffs and the other employes whom they represent, and in refusing them re-employment under the seniority list for the South Louisville Roundhouse, defendant Railroad Company has arbitrarily discriminated against all employes on said Seniority Rosters for the South Louisville Roundhouse, despite the many years of faithful service by said employes and deprived said employes of the rights which they had earned over years of hard labor for said defendant. Said acts of said defendant Railroad Company are in violation of said union contracts, in violation of the Railway Labor Act as amended; and arbitrarily deprives said employes of their property rights."

As specifically alleged, the Railroad Company laid off all the Roundhouse employes. Yet it continued to have the same work done in the exact area which up to that time had been the Roundhouse Shops, using employees from other rosters. Petitioners insist that the Roundhouse area could not be changed to the Louisville Shops area by mere work bulletins. This area was still geographically the Roundhouse area. Respondent's Brief *omits any statement that the location where petitioners worked up to February 17, 1957* and the *location in which their* Complaint sought, and petitioners still seek, the regulation of petitioners' seniority rights, are *exactly the same* area.

Of course the Louisville Shops area still includes the old Shops location, but the Railroad Company's Brief takes the position that the work of the Roundhouse had been transferred to the Louisville Shops although performed on the same ground as prior to February 18th, 1957. The Complaint makes no claim for any rights for petitioners in any area, point or location, except that which had up to February 18, 1957 been in the Roundhouse seniority area (or district).

The Brief for the Railroad Company says on pages 5 and 6 "The South Louisville Roundhouse has been torn down due to the entire dieselization of the railroad (18b, 22b)." So it has, but that fact has no significance in this action. That building was torn down in 1956 or before, when the new work pits were constructed. This fact appears in the record before the National Railroad Adjustment Board, paragraph 17 and 23. Despite the fact that a roundhouse was not needed for dieselized engines, work continued in the Roundhouse area—performed only by employees on the Roundhouse rosters—until February 18, 1957.

For some unexplained reason the Railroad Company and Unions found that a contract which for fifteen years or more had meant that the seniority in the Roundhouse area belonged to the rosters for that area, did not mean this any more. By some magic touch the Railroad Company had abolished the Roundhouse area and just combined that particular ground into the Shops area. At that magic moment the bargaining agreement carried no longer any seniority rights in this particular territory for the employees

on the seniority roster. Theoretically the Roundhouse District had been abolished and all the territory moved into the Louisville Shops District. Men on the Louisville Shops rosters then had the seniority rights to the jobs in both the former areas, while men on the Roundhouse rosters had no rights. *They were furloughed*, but if any jobs in the territory formerly in the Roundhouse area were not desired by persons on the Louisville Shops rosters the employees on the Louisville Roundhouse rosters could start anew, with the seniority of a brand new L. & N. employee, in the geographical location where they had worked the day before.

On page 6 of the Counter-Statement of The Case this statement is made.

"The South Louisville Roundhouse seniority rosters continue to be maintained so that, if mechanical operations are reestablished there, the employees on those rosters may perform such work at the seniority point in accordance with these seniority rights (8b-9b)".

This is a prize statement of the L. & N.'s position. Why are these rosters maintained? With all of the Roundhouse area included within the boundaries of the South Louisville Shops area where can these useless rosters be posted?. They have not been used since February 17, 1957. Where could mechanical operations be reestablished, with the entire area now being included within the Louisville Shops District. The Railroad Company's counsel should realize this fact because they filed the Affidavit of Mr. W. S. Scholl so stating, and

they filed the Transcript of the National Railroad Adjustment Board proceedings, which contains the statement in the first paragraph that:

> "Immediately following the discontinuance by the Carrier of such operations; the jobs comprising such operations were bulletined by the Carrier. Some of such jobs were bid in by other employees of the Carrier junior in seniority to petitioners. The remaining jobs were by the Carrier assigned to junior employees or assigned to some of petitioners with a new seniority dating of February 18, 1957."

Counsel for the Respondent, L. & N. Railroad Company, can also learn these facts from reading the Complaint and they can ascertain that the same type of work has been carried on in the former Roundhouse area yards daily ever since February 17, 1957.

The Railroad Company must have some purpose in continuing to maintain these Roundhouse District rosters. To that limited extent it is conscientiously observing its written bargaining agreement. But the admission or bragging, that it is still maintaining the rosters, indicates that it believes the contract requires it to do so and that the rosters have some significance. At least it is a memorial to the fact that up to February 17, 1957 the Railroad Company correctly interpreted its written contract, with fair treatment for the employees whom it has now furloughed without a hope.

It has not pointed out, however, in what geographical area these seniority rosters have any significance

and the maintaining of these rosters is certainly inconsistent with the interpretation which the Railroad Company now places on the contract provision. Maybe the Railroad Company's conscience is consoled somewhat by keeping a list of 66 employees for whom on February 18, 1957 it had no further jobs, just rosters kept for a maybe.

The Brief for the Railroad Company says on pages 6 and 7 under the Counter Statement of the Case that

> "The Roundhouse employees were dissatisfied because the seniority accumulated by them in the South Louisville Roundhouse seniority district was not carried over by them into the seniority district of the South Louisville Shops and they protested to the railroad (5b, 9b)."

This is partly correct, but only incidental to the petitioners' real contract rights. If work in the area formerly known as the South Louisville seniority district had been entirely discontinued, petitioners might have sought to follow the work into the area of the South Louisville Shops. But that wasn't the situation. When work continued as before February 18, 1957 in the Roundhouse seniority district, with South Louisville Shops employees only working there, petitioners sought the same privileges which Respondent gave to the employees on the Shops rosters. That is what, in a sense of fair play, the Railroad Company might have accorded to them, either before or when they went to the National Railroad Adjustment Board.

But the Railroad Company had become technical. The contract carried no right of dovetailing. The

Adjustment Board was strictly correct in deciding that, and in denying this relief. But even *it could* have used its good offices in the interests of fair play. Instead it seems to have been more impressed by the final statement by the Carrier to the Board that:

> "There is no dispute between carrier and System Federation No. 91, AFL, concerning petitioners involved in the South Louisville, Kentucky, roundhouse force reduction. There is, therefore, no merit to the request of the petitioners and it should be denied."

Then the Counter-Statement says that petitioners conceded that the Railroad Company had the right to abolish the Roundhouse. Petitioners have not been trying to manage the railroad. They will even concede the right to abolish a geographical district. But they do not concede the right to combine two districts (abolishing neither work area) to the prejudice of the contract rights of the employees on the seniority rosters of either district. That is what the Railroad Company has done. And there has not ever appeared any valid reason whatever why it could not, or did not, respect the contract rights of employees on both sets of rosters.

The same unions represented the craftsmen on both sets of rosters. They could certainly represent both sets of employees, if they had so wished.

The Counter-Statement says that the L. & N. believed its actions were strictly in accord with the applicable collective bargaining agreements. Possibly the negotiators overlooked the contract rights to senior-

ity of the employees who were furloughed (but saw other employees take their same jobs at the same geographical location). Their counsel must have strained their conscience in overlooking these contract rights.

REASONS FOR GRANTING THIS WRIT.

In the Petition for a Writ of Certiorari in this case, Petitioners pointed out that this action involves the claimed violation of Section 1 of the Fourteenth Amendment to the United States Constitution. It further involves a statutory provision being Section 153 of Title 45 U. S. Code. Copies of these constitution and statutory provisions are contained in Item 5 of the Appendix to the Petition for Writ of Certiorari.

This action really furnishes a test case as to whether a railroad company which has established long ago a system of point seniority rosters for specific areas for mechanical shops, can furlough all employees at "Point A" established for over 50 years and then (secretly or openly) immediately move the boundaries of "Point B" so as to include all the area which had long been in "Point A", then deny to these furloughed employees any seniority rights in the territory formerly included in "Point A". This statement on its face indicates that it constitutes a deprivation of contract rights from the employees on the "Point A" rosters. But the employees on those rosters have had insult added to injury when they were told that they could work at their old location *with no accrued seniority*, if the employees on the rosters of another *point* didn't want the jobs.

A. Status of This Action in Trial Court.

Petitioners in this action were 66 employees listed for years on the rosters of the South Louisville Roundhouse District of the Louisville and Nashville Railroad Company. These 66 employees had seniority in the various mechanical crafts working in the Roundhouse Shops. The collective bargaining contracts which had been in effect since 1942 or 1943 created property rights to seniority in the Roundhouse District. Petitioners had enjoyed the benefit of the seniority which they had earned over various periods of years as are recited in the Complaint in Equity filed in this action (T. of R., p. 27).

The activating cause for this action was a change in the interpretation of the contract, suddenly sprung upon the Petitioners by bulletins announcing that each of these 66 employees (being all of the employees on all the Roundhouse District rosters) were to be furloughed effective February 17, 1957. In this action Petitioners claim that any such sudden and revolutionary change in the interpretation of a collective bargaining agreement amounted to an actual unwritten amendment to the contract to cover the situation upon the Respondent Railroad Company combining two established points or districts having separate seniority rosters.

Petitioners claim that no such alterations in the collective bargaining agreement were ever adopted by the parties to the contracts, and any attempt to change the operations and operating conditions in the area in

which the Roundhouse District was located, constitute violations of the contract as regularly adopted and still effective.

Petitioners brought this suit for and on behalf of all the 66 employees who were furloughed on February 17, 1957 and who have been deprived ever since of all rights under the rosters which were in effect on January 1, 1957 and thereafter.

Petitioners insist that the Jefferson Circuit Court has jurisdiction to determine the right of the parties for violation of the contract by arbitrary discrimination in the Roundhouse District area against the employees listed on the Roundhouse seniority rosters and in favor of employees in the same crafts from other seniority district rosters.

The Chancellor in his opinion directing that the Complaint be dismissed for lack of jurisdiction, based this decision upon the fact that the Board's jurisdiction is exclusive and that its orders are final. The Kentucky Court of Appeals in its opinion dated November 2, 1962 says that the National Railroad Adjustment Board has exclusive jurisdiction and its decision in this class of disputes is final. The Court of Appeals likewise held that the Board has exclusive primary jurisdiction of such controversies and that its decisions in this class of disputes is final. All that means that the Petitioners in this action are deprived of any opportunity whatever for a consideration of their claims of contract violations depriving them of property rights which the Fourteenth Amendment to the United States Constitution protects. The Petitioners

recognized that to bring an action in the courts of Kentucky they must, as required by the Kentucky Court of Appeals, exhaust the procedural remedies available. They did this.

One of the administrative steps which Petitioners thought to be necessary was an application to the National Railroad Adjustment Board. They were wrong in this, as the National Railroad Adjustment Board has no jurisdiction over attempted modifications of collective bargaining agreements. These are major questions, not disputes of which the Adjustment Board is given jurisdiction.

B. Effect of Application to the National Railroad Adjustment Board.

The Respondent Railroad Company takes the position that having filed a Complaint with the National Railroad Adjustment Board, the Petitioners have become litigants with unclean hands. They merely state that Petitioners filed a proceeding with that Board and, therefore, Petitioners have no rights in the courts, because the jurisdiction of the Adjustment Board is exclusive.

The Railroad Company has not been willing to face the real question in this action. The Petitioners were "furloughed", as far as their Roundhouse rosters were concerned, and found that the employees listed on the rosters for the Louisville Shops area had been granted, by Respondent Railroad Company, seniority rights beyond their own district over the entire ter-

ritory previously designated as the Roundhouse district area.

Since the Roundhouse District area had an earlier origin than the Louisville Shops area, and some of the employees listed on the rosters had seniority even greater than the employees on the Louisville Shops rosters, Petitioners attempted to work out an adjustment of the situation with the Railroad Company by asking for a dovetailing of the names on the two sets of rosters. This idea was very meritorous, but it was not included in the terms of the contract. The Railroad Company might have saved itself some trouble if it had attempted to adjust matters that way. They did not; they were adamant.

We recognize that on any question in regard to the dovetailing of the names from the two rosters the application to the National Railroad Adjustment Board was exclusive, and the decision on that question was final.

On the other hand this action does not involve dovetailing. It is for a declaration of rights as between the Petitioners, representing all 66 employees on the Roundhouse rosters and the Railroad Company. This action is not brought to try to compel the Railroad Company to grant some right which was not included in the collective bargaining agreement. The rights which the Petitioners claim are those which the contracts of 1942 and 1943 gave to persons on the Roundhouse rosters and which they enjoyed through February 17, 1957.

Petitioners, in their Petition for Certiorari cited cases both before and after the passage of the Act in regard to the Railroad Adjustment Board, recognizing the rights of the Railroad employees to bring actions in enforcement of their contract rights in the Courts of Kentucky. This question has never been considered in this case by the trial Court or the Court of Appeals of Kentucky, and the petitioners will be absolutely without remedy, unless this Petition for Writ of Certiorari is sustained and this action is referred back to the Courts of Kentucky for a hearing and determination on the question of rights of the 66 employees to seniority under the only written contract in existence between the various crafts of railroad employees and the Louisville and Nashville Railroad Company.

The questions which were submitted to the Jefferson Circuit Court in Kentucky and then to the Court of Appeals of Kentucky were not presented to the National Railroad Adjustment Board, and there is no conflict with reference to exclusiveness of jurisdiction or finality of decision.

C. The Courts Have Jurisdiction Over Actions Involving Discrimination.

The Petition for Writ of Certiorari calls attention to the fact that on January 28, 1957 a conference was held between the Carrier and bargaining representatives of the Unions in regard to the collective bargaining agreement as effecting the individual rights of employees on the Roundhouse District rosters and the

South Louisville District rosters. No persons whose names were on the Roundhouse rosters were invited to this conference and none of them were advised of the decisions reached in the conference until they saw the bulletins announcing that all of them had been furloughed. They are still furloughed insofar as the Roundhouse rosters are concerned, although work never stopped in the exact geographical area where they had been working since the 1920's and at all times during the existence of the two collective bargaining agreements negotiated in 1942 and 1943.

The only excuse ever offered for the furloughing of the 66 employees on the Roundhouse seniority rosters was that there had been an interpretation changing the meaning of the contract. A change in interpretation by the Railroad Company is no more effective than a secret agreement such as was reached in the cases of Steele v. L. & N. R. R. Co. *et al.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 133, or in the case of Tunstall v. Brotherhood, 323, 210, 65 S. Ct. 235, 89 L. Ed., 187, or the actions of the Unions in assenting to application of contract provisions in Conley v. Gibson, 335 U. S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99.

As specifically held in those cases, secret agreements effecting arbitrary discriminations against specified groups of employees, are in conflict with the Fourteenth Amendment to the Constitution of the United States in depriving these employees of their contract property rights. These cases, not the other citations given by the Respondent in its Brief in Opposition to the Petition for Writ of Certiorari, are controlling in

this case. The Respondent Railroad Company would have the Petitioners deprived of any right to go into court, merely because they went to the National Railroad Adjustment Board, basing their argument on the case of Pennsylvania Railroad Company v. Day, 360 U. S. 548, 79 S. Ct. 1322, 3 L. Ed. 1422. In that case the Court held that the employee who continued to work could not bring suit for additional pay but must go to the National Railroad Adjustment Board. We respectfully urge the Court that those employees who had sufficient confidence in their employer to continue to work for the employer, even after they had been deprived of all seniority rights, should not be deprived of the right to a day in court in regard to the meaning of the contract under which they had served for many years. As far as the Railroad Company was concerned in this case, it had terminated any employment relations with the Petitioners by permitting them to work thereafter only with a seniority starting from February 18, 1957 or thereafter.

Certainly in this case there is no such disqualification of the employees from making claims in regard to the discrimination exercised against them under the collective bargaining agreement, when they did not take before the National Railroad Adjustment Board the particular issues which they seek to have the Court determine.

The Court has not only recognized the right of the Petitioners to have their contracts respected and enforced as written, without illegal and discriminatory contract provisions, secretly added, but has specifically

held in the case of Steele v. L. & N. R. R. Co., 323, U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; that the Railroad Adjustment Board did not have jurisdiction over controversies where the unions and the carrier had agreed upon secret modifications. That decision evidently recognizes the reason why the Railroad Company in this case made as its closing argument to the National Railroad Adjustment Board the statement that there was no disagreement between it and the Unions. Since the Act gives to individual employees the right to assert claims, why did this fact have any meaning?

The attempt abolition of a designated point under the point system, without any change in the contract, certainly amounted to a willful, flagrant, incredible discrimination from the standpoint of the constitutional rights or for the protection of property or the equality of treatment, and this conduct should shock any fair minded person. This was a plain unilateral attempted change in the provisions of a collective bargaining agreement under the pretext of an interpretation. If this was not an illegal change of a contract, as Petitioners claim that Respondents attempted, a Court should have an opportunity to decide the facts in regard to it. The change resulted in manifest discrimination against all of the Petitioners. Their only hope for relief is through a decision sustaining their Petition for Writ of Certiorari and upholding Petitioners' right to a trial on the facts. The Court should give significance to the continued publication of Round-

house rosters which are useless at present because of the Railroad Company's assumption that it can voluntarily abolish a point designated in a contract without any change in the contract itself.

RESUME.

Petitioners respectfully ask the Court to protect their rights to a hearing before a judicial tribunal as to the discrimination which has been inflicted upon them through the so-called "interpretation" of a collective bargaining agreement, secretly made so as to deprive all the Petitioners of every seniority right which had any value. They look to this Court for the protection of the property rights which they thought they had up to February 17, 1957 and to which they still believe they are entitled.

Respectfully submitted,

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